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IN THE

Supreme Court of the United States

October Term, 1970.

No. 405

In Re: Declaration of Taking of Certain Premises Located at the South Side of College Avenue and West Side of Coopertown Road and Extending to Darby Road, by the School District of Haverford Township.

THE CONNELLY FOUNDATION,
Appellant,

v.

THE SCHOOL DISTRICT OF HAVERFORD TOWNSHIP,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

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IN THE

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OCTOBER TERM, 1970

No.

IN RE: DECLARATION OF TAKING OF CERTAIN PREMISES LOCATED AT THE SOUTH SIDE OF COLLEGE AVENUE AND WEST SIDE OF COOPERTOWN ROAD AND EXTENDING TO DARBY ROAD, BY THE SCHOOL DISTRICT OF HAVERFORD TOWNSHIP.

THE CONNELLY FOUNDATION,

Appellant,

v.

THE SCHOOL DISTRICT OF HAVERFORD TOWNSHIP,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant, Connelly Foundation, appeals from the final judgment of the Supreme Court of Pennsylvania entered in this eminent domain proceeding on April 22, 1970 affirming the decision of the Court of Common Pleas of Delaware County, Pennsylvania, holding that Appellant's property was not exempt from condemnation and that condemnor had posted adequate security for the payment of just compensation.

OPINIONS BELOW.

The opinion in the Supreme Court of Pennsylvania is reported at 437 Pa. 536 (1970). The opinion and order of the Court of Common Pleas of Delaware County, Pennsylvania is reported at 56 Del. 264 (1969). Both opinions are set forth in Appendix A at pages A1-A16.

JURISDICTION.

The opinion of the Supreme Court of Pennsylvania was filed on April 22, 1970. The notice of appeal was filed in the Court of Common Pleas of Delaware County, Pennsylvania on June 25, 1970.

The jurisdiction of this Court to review this case upon appeal is conferred by 28 U. S. C. sec. 1257(2), 2101(c). The following decisions sustain the jurisdiction of this Court to review the judgment below on appeal. *Bragg v. Weaver*, 251 U. S. 57 (1919); *Dahnke-Walker Milling Co. v. Bondurant*, 527 U. S. 282 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama I. P. Co.*, 240 U. S. 30 (1916); *Stone v. Southern Ill. & Mo. Bridge Co.*, 206 U. S. 267 (1906).

STATUTES INVOLVED.

Public School Code, Act of March 10, 1949, P. L. 30, Art. VII, section 721, 722, and 672, 24 P. S. 7-721, 7-722, 6-672. Eminent Domain Code, Act of June 22, 1964, P. L. 84, Art. V, section 403(B), 26 P. S. 1-403. These statutory provisions are set forth in Appendix B at pages B1-B4.

QUESTIONS PRESENTED.

I.

Is it not a violation of the Establishment Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment for a condemnor to discriminate against an organization which devotes its entire effort and activity to religious ends by denying that organization the same exemption from condemnation as that enjoyed by associations espousing orthodox religious beliefs?

II.

Is not the pledge of the taxing power of a school district insufficient security for payment of just compensation where the realization of the proceeds of that taxing power by the condemnee is not reasonably certain?

STATEMENT.

On November 9, 1967, the Board of School Directors of the School District of Haverford Township, Delaware County, Pennsylvania passed a resolution authorizing the filing of a Declaration of Taking of premises owned by Appellant. The premises is located at the South side of College Avenue and the West side of Coopertown Road, Haverford Township, Delaware County, Pennsylvania. The Declaration was filed on November 10, 1967.

The Appellant, owner of the premises, is a non-profit Pennsylvania Corporation, formed in 1955 (N. T. 8). The corporate charter of Appellant provides:

> "The corporation does not contemplate pecuniary gain or profit, incidental or otherwise, to its members. Its purposes are as follows: The corporation shall be operated exclusively for religious, charitable, scientific, literary, or educational purposes.
>
> 'A. The activities which the corporation shall carry on from time to time shall be such as may be determined by the Board of Directors to promote the public welfare whether such activities be purely religious, charitable, scientific, literary, or educational, or whether they be a combination of such purposes'."

The property here involved was acquired by Appellant in 1962 and until its condemnation in November of 1967, was used solely and exclusively for religious purposes. More specifically, it was used by two different orders of Nuns as a novitate or convent for the training of young Nuns or postulants who were studying for the order. In addition to allowing the Nuns to occupy the property, the Appellant paid a portion of its upkeep, including $4,000 in 1965, $23,000 in 1966 and $24,000 in 1967 (N. T. 16, 17, 18, 21).

Appellant's corporate activities involve the making of contributions. Its contributions for the years 1965, 1966 and 1967 amounted to approximately $1,200,000 and ninety-eight per cent of this amount went to religious organizations (N. T. 11).

Under the Pennsylvania Eminent Domain Code and Public School Code, Appellee's taxing power is deemed pledged as security for the payment of just compensation. While Appellee would contend that this constitutes adequate security for the payment of just compensation to Appellant, it nevertheless concedes that the financing for this project will be done through a municipal authority for the avowed purpose of circumventing the debt limitation imposed upon Appellee by the laws of Pennsylvania.

Appellee concedes that the use of this financing vehicle will in no way increase its ability to pay just compensation. Appellee further concedes that its tax revenues will be paid to the authority to enable that authority to amortize the debt incurred to finance the project. The authority is not a party to this litigation and there is no relationship, contractual or otherwise, between the authority and Appellant.

It is Appellant's contention that in reality it has received nothing more than a hollow pledge, since it has no reasonable expectation of receiving just compensation from those revenues.

The Appellant filed preliminary objections to the Declaration of Taking. Appellant primarily objected to the Taking contending that the land was exempt from condemnation, under Section 721 of the Public School Code of 1949 and further contending that Appellee had failed to give proper security for the payment of just compensation.

The Public School Code in part here pertinent provides as follows:

"Provided: That no Board of school directors shall take by condemnation any burial ground, or any land belonging to any incorporated instituation of learning, incorporated hospital association, or unincorporated church, incorporated or unincorporated religious association, which land is actually used or held for the purpose for which such burial ground, institution of learning, hospital association, church or religious association was established." Act of March 10, 1949 P. L. 30, Article VII, Sec. 721, known as the Public School Code of 1949, 24 P. S. 7-721.

After hearing, and on the 23rd day of January, 1969, the Lower Court (Judge Francis J. Catania) entered its Order dismissing the preliminary objections. On March 10, 1969, the Appellant appealed to the Supreme Court of Pennsylvania. On April 22, 1970, the Supreme Court of Pennsylvania affirmed the Order of the Court of Common Pleas of Delaware County from which affirmance this appeal is taken.

Appellant appeals from this final order under 28 U. S. C., Section 1257(2), 2101(c) on the ground that construing the Public School Code, 24 P. S. 7-721, so as to deny Appellant the same exemption from condemnation as that accorded Orthodox Religion is repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

Further Appellant appeals from this final Order on the ground that the pledge of taxing power as security for payment of just compensation as provided for by the Public School Code, 24, P. S. 7-722 and the Eminent Domain Code, 26 P. S. 1-403, as applied to the facts of the case at bar is repugnant to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

THE QUESTIONS ARE SUBSTANTIAL.

I.

The Pennsylvania Supreme Court Has Applied the Pennsylvania Public School Code in a Manner Repugnant to the First and Fourteenth Amendments to the United States Constitution by Denying Applicant the Same Exemption From Condemnation as that Enjoyed by Orthodox Religions.

The Supreme Court of Pennsylvania has characterized Appellant as a charity and not a religious association (A15). The effect of this characterization is to deny to Appellant exemption from the exercise of the power of eminent domain which admittedly would be granted an orthodox religion expressing man's worship of divinity and submission to mandates of supernatural or superior beings (A15).

It is the position of Appellant that if the Pennsylvania Supreme Court is requiring for application of the exemption, a belief or worship of a supernatural being or Deity, then its application runs afoul of the Establishment Clause of the First Amendment to the United States Constitution. If, on the other hand, the Court below has not included such a requirement within its concept of a religious organization, then its application of the exemption provisions of the statute violates the Equal Protection Clause of the Fourteenth Amendment, as there is then no reasonable basis to distinguish Appellant from orthodox religions.

It is axiomatic that exemptions granted by state statutes to religious organizations can be upheld under a First Amendment attack only on the basis that they are granted, not for theistic attributes of the practice, but

because of the non-theistic or sociological benefits flowing from the organization to the community *Fellowship of Humanity v. County of Alameda,* 315 P. 2d 394 (D. Ct. App. of Calif. 1957). If the Pennsylvania Supreme Court is demanding, as a requirement for application of the exemption, a worship or belief in the Deity, then clearly a violation of the Establishment Clause has occurred. *Sherbert v. Verner,* 374 U. S. 398 (1963).

The lower court's reference to the definition of religion contained in Black's Law Dictionary, 4th Edition at page 1455, to wit: "Man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural of superior beings" would lead to the conclusion that this requirement was indeed imposed (A15). If the Court below did not impose the requirement of theism, to distinguish Appellant from Orthodoxy, then it is appellant's contention that it has been singled out for different treatment with no basis in fact for so distinguishing. Such treatment is clearly violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Bolling v. Sharpe,* 347 U. S. 497 (1954); *Sherbert v. Verner,* 374 U. S. 398 (1963).

Excluding theistic considerations from the definition of religion, there must be found some reasonable basis to sustain the distinction by the Court below. Scholars, philosophers, historians, writers, and indeed this Court have long been engaged in the quest to establish the outer boundaries of the definition of "religion." Perhaps the most significant breakthrough in this quest occurred in 1965 with this Court's opinion in the case of *United States v. Seeger,* 380 U. S. 163 (1965). In the *Seeger* case this Court put to rest forever the notion that essential to the definition of religion was the mosaic of man on bended knee before an altar in an edifice specifically designed for

the worship of a Supreme Being. On the contrary, a review of this Court's opinion in *Seeger* demonstrates that the spectrum of beliefs and actions encompassed within the word "religion" is indeed vast. It ranges from Buddhism and Hinduism to Mr. Seeger's own position, i. e. ". . . belief in and devotion to goodness and virtue for their own sakes and a religious faith in a purely ethical creed." 380 U. S. at 166.

The principles enunciated in the *Seeger* case were recently reaffirmed and amplified in the case of *Welsh v. United States,* — U. S. —, 38 U. S. L. W. 4486 (1970). In the *Welsh* case, this Court once again indicated that ". . . meaningful beliefs need not be confined in either source or content to traditional or parochial concepts of religion" and further reiterated the long established policy of not picking and choosing among religious beliefs. 38 U. S. L. W. at 4487.

It is undisputed that Appellant's entire energies, its entire activities have been devoted toward the aiding of what might be termed "orthodox religions." This is Appellant's Creed. This is Appellant's purpose. This is Appellant's only goal. It is submitted that there cannot, and should not, be any legal distinction between the belief of Appellant as expressed in its actions and that involved in the *Welsh* and *Seeger* cases. The Connelly Foundation, as demonstrated by its actions, holds a deeply rooted belief in the nurturing of religions. Admittedly, Appellant in its own right espouses no belief in a Supreme Being. However, to classify it as non-religious because of this would be to restore the theistic concept to religion which as indicated above has been rejected by this Court.

It is Appellant's contention that an association which devotes its entire existence to nurturing orthodox religions is then itself a *de facto* religious association for the purpose

of enjoying exemption from condemnation. Appellant believes that its position finds ample support in the *Seeger* and *Welsh* cases. Indeed it is difficult to conceive how an entity such as the Connelly Foundation could be classified as other than a religious association.

As already noted exemptions accorded to religious associations in various state statutes have withstood attack under the Establishment Clause because of, and only because of, the benefits realized to the community from the nontheistic aspects of those religions. *Fellowship of Humanity v. County of Alameda*, 315 P. 2d 394 (D. Ct. of App. of Calif., 1957); *Washington Ethical Society v. District of Columbia*, 249 F. 2d 127 (D. C. Cir. 1957). There can be no logical difference between benefits indirectly accorded the community through orthodox religions and those flowing directly from orthodox religions. It is suggested that the proper test to be used in determining whether an association is a religious one is whether the belief held by that association, as demonstrated by its actions, occupies the same place in its existence as do the beliefs held by one espousing orthodox religion. As already indicated, the Connelly Foundation expends its entire corporate energy for the good of orthodox religion. Certainly this would qualify Appellant as a religious association in accordance with the definition of "religion" announced by this Court in the *Seeger* and *Welsh* cases.

In the final analysis it would appear that the Pennsylvania Supreme Court has placed an inappropriate amount of emphasis on form and correspondingly has ignored the substance or realities of the situation. In essence, the Pennsylvania Supreme Court has singled out the Connelly Foundation because, it is submitted, the Connelly Foundation does not give the image of a traditional religion. This is obvious from the manner in which that Court distin-

guished the cases relied upon by Appellant (A15-A16). Distinguishing in this manner, i.e. preferring some religions over others, runs afoul of the Equal Protection Clause of the Fourteenth Amendment and the Establishement Clause of the First Amendment to the United States Constitution.

In summary, if in its interpretation of the Pennsylvania Public School Code, the Pennsylvania Supreme Court has included in its definition of religion a theistic concept, then that interpretation runs afoul of the Establishment Clause of the First Amendment. If, on the other hand, the Pennsylvania Supreme Court in applying the Pennsylvania Public School Code has distinguished Appellant from other more traditional religions without theistic considerations, then in light of the definition of religion as laid down by this Court in *Seeger* and *Welsh*, such application to Appellant runs afoul of the Equal Protection Clause of the Fourteenth Amendment.

II.

The Supreme Court of Pennsylvania Has Construed Pennsylvania Statutory Law to Provide That the Pledge of Taxing Power by a Condemning School District Is Sufficient Security for the Payment of Just Compensation Even Though That Pledge Provides Condemnee With No Certainty of Payment as Due Process Requires.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the giving of adequate security to secure payment of just compensation in condemnation proceedings. *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S. 641 (1890).

Pursuant to section 722 of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30 Art. VII, 24 P. S. 7-722, the Appellee pledged its tax revenues as secu-

rity for the payment of just compensation. Section 403(B) of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P. L. 84 Art. IV, Sec. 403, 26 P. S. 1-403, provides that in such cases no bond is necessary.

The testimony elicited by Appellee in the Court below on this issue demonstrated that, at best, its financial position is far from secure. The undisputed facts disclose that the total cost of the school project will greatly exceed Appellant's present remaining debt limitation under Pennsylvania law (N. T. 263, 286). The Appellee intends to avoid its debt limit by financing the project through its School Authority, which Authority has no such debt limit (N. T. 264). It is projected that the Authority will raise the necessary funds by means of a bond issue (N. T. 267). Appellee admits, however, that using this authority financing does not, in any way, enlarge or create new assets available for payment of debts (N. T. 273).

In the case of *Joslin Mfg. Co. v. City of Providence*, 262 U. S. 668 (1922), this Court reaffirmed the principle that just compensation is adequately secured . . . . "when the public faith and credit are pledged to a reasonable prompt ascertainment and payment, and there is adequate provision for enforcing the pledge." 262 U. S. at 677.

Appellee will contend that it possess unlimited ad valorem taxing power to pay lease rentals to a School Authority to finance the construction of the project pursuant to section 672 of the Pennsylvania Public School Code of 1949, 24 P. S. 6-672. Appellee will concede, however, that in other instances its taxing power is limited. More specifically, had Appellee chosen to finance this project without the use of an Authority, it would *not* have unlimited ad valorem taxing power to pay just compensation to condemnees or to otherwise finance the project.

It is also undisputed that the Authority is not a party to these proceedings and has not by contract or otherwise

obligated itself to appellant for the payment of just compensation.

It is Appellant's position that since the tax revenues purportedly pledged by the Appellee for the payment of just compensation will not, in fact, go to Appellant but rather to the Authority, the pledge given is indeed hollow and not of the quality required by the Due Process Clause.

While Pennsylvania law does provide for an adequate procedure to determine just compensation, the undisputed facts of the case lead inescapably to the conclusion that once determined, the Appellant cannot be reasonably certain of receiving the compensation to which it is entitled. In the final analysis, the money earmarked for Appellant as noted above will be paid to an Authority which, at least as regards appellant, is a stranger both to the transaction and to these proceedings. Thus, the Pennsylvania Supreme Court, in construing the Pennsylvania Public School Code and the Pennsylvania Eminent Domain Code, to permit a pledge of taxing power to stand as security for the payment of just compensation under the facts of this case, has applied those statutes in a manner which it is contended is repugnant to the Fourteenth Amendment of the United States Constitution.

This question is particularly pertinent in this day as the use of an Authority is an increasingly popular financing method. The facts of this case demonstrate how the interposition of this third party to what normally would be a two party transaction can well entail constitutional considerations. More specifically, when time for payment arrives, who will be paid first, the creditors of the Authority or Appellant? Since the Authority is not a party to this litigation there can be no proper judicial inquiry or control placed upon its receipt and application of funds as a court might otherwise deem appropriate.

The Appellee, in answering the question of how just compensation will be paid, simply refers to a third party over which the Court has no control. Had the Authority been the condemning agency, a bond to secure the payment of just compensation would have been exacted. This has been conveniently avoided. Again, the Supreme Court of Pennsylvania has exalted form over substance.

In conclusion, the pledge of taxing power in this case, coupled with the authority method of financing with its avowed purpose of avoiding the debt limitation imposed upon Appellee by Pennsylvania law, clearly fails to meet the requirements of the Due Process Clause of the United States Constitution. In this case no adequate provision has been made ". . . for the certain payment of the compensation without unreasonable delay . . ." by Appellee. *Bragg v. Weaver*, 251 U. S. 57, 62 (1919).

CONCLUSION.

The Pennsylvania Supreme Court has applied the Pennsylvania Public School Code in a manner repugnant to the First and Fourteenth Amendments to the United States Constitution by denying appellant the same exemption from condemnation as that enjoyed by orthodox religions.

The Supreme Court of Pennsylvania has also construed Pennsylvania Statutory Law to provide that the pledge of taxing power by a condemning school district is sufficient security for the payment of just compensation even though that pledge provides condemnee with no certainty of payment as Due Process requires.

We respectfully submit that probable jurisdiction should be noted and hearing on the merits granted.

DATED: July 13, 1970.

Respectfully submitted,

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APPENDIX A.

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA.

No. 13741 of 1967.

DECLARATION OF TAKING OF CERTAIN PREMISES LOCATED AT THE SOUTH SIDE OF COLLEGE AVENUE AND WEST SIDE OF COOPERTOWN ROAD AND EXTENDING TO DARBY ROAD, BY THE SCHOOL DISTRICT OF HAVERFORD TOWNSHIP.

GARLAND D. CHERRY, ESQUIRE, for Condemnee.
GEORGE S. SAULNIER, ESQUIRE, for School District of Haverford Township.

Findings of Fact, Conclusions of Law and Final Decree.

The record in this case indicates that the School Board of Haverford Township desires to acquire a tract of ground containing approximately 44 acres, including the Connolly property of approximately 17 acres, which is owned by the Connolly Foundation and which is the subject of this litigation, the Lloyd property of approximately 11.8 acres and the Little Sisters of the Assumption property of approximately 15.6 acres.

The School Board was unsuccessful in its efforts to purchase the Connolly property and on November 9, 1967, at a regular public meeting passed a resolution condemning the Connolly property. A declaration of taking was filed

in the Court of Common Pleas by the School Board and notice sent to the condemnee, the Connolly Foundation.

The condemnee has filed preliminary objections to the declaration of taking; the condemnor has filed answers thereto; and testimony has been taken by the Court.

From the evidence produced before the Court, we make the following:

FINDINGS OF FACT

1. Before condemning the property in question the School Board through its agent made efforts to approach the owner and did in fact contact him to negotiate an amicable purchase agreement with the owner, but the owner manifested a refusal to sell or negotiate with the School Board or its agents.

2. Because of the large increase in school population the School Board recognized the need for a new school at least as early as 1966 and at a regularly scheduled public meeting on August 11, 1966, appointed the firm of Englehardt, Englehardt and Leggett, educational consultants, to make a survey, which survey was received by the Board in January, 1967.

3. The School Board realized the existing school facilities were overcrowded even to the extent that the corridors were used on occasion for classrooms.

4. The Department of Public Instruction of the Commonwealth recommends for a school of this type 20 acres plus an acre for each hundred students. Some 2,100 additional pupils had to be provided for and some 40 acres or more are needed to do the job.

5. The proposed school site consists of approximately 44 acres including the Connolly property of approximately

17 acres, the Lloyd properties of approximately 11.8 acres and the Little Sisters of the Assumption property of approximately 15.6 acres.

6. Before the condemnation resolution was passed, the needs of the School District were discussed by the Board with its administrative staff, its educational consultants, architects, real estate advisor and appraisers, as was the site selection, at a number of caucus (non-public) meetings during 1967.

7. The School Board had a good idea of cost as early as January, 1967, from the Englehardt report and discussions with architects and appraisers in the summer and fall of 1967.

8. To protect the taxpayer from increased prices of ground, these discussions were not made public.

9. Before the condemnation resolution was adopted, the Board gave its architect, Vincent Kling, a list of nine properties that the Board had been considering and instructed him to study them. He examined personally, on site, nine properties.

10. The architect and his staff studied the properties and others, the report of Englehardt, Englehardt and Leggett and examined the Commonwealth's specifications for school site selections.

11. The architect met with the School Board on the average of once every ten days and discussed the progress of the work. Members of the Board and the architect looked at the properties together.

12. The architect met with the School Board on the question of site six or eight times, and communicated his findings, opinions and information to them.

13. As early as the spring of 1967, the School Board had the unofficial advice of the Executive Director of the Delaware County Planning Commission that the Ellis Tract, one of those sites considered by the Board, was less than optimum for a school site in that it was on the extreme edge of the district, portions of it had extremely steep topography, and the portions that were suitable for building were broken into smaller areas.

14. Although the Board had been interested in and actually entered into negotiations for the acquisition of the so-called Ellis Tract, the Board learned in June or July, 1967, that the Little Sisters of the Assumption property, adjacent to the Connolly property, was for sale. The availability of the Little Sisters property coupled with the Connolly property and the Lloyd properties became the choice of the School Board as a site for the new middle school.

15. On November 9, 1967, at a regular scheduled public meeting, the School Board passed and adopted by unanimous vote the condemnation resolution condemning the Connolly property.

16. The School Board's selection of site has been approved by the Pennsylvania Department of Public Instruction, Department of Health, Department of Highways, Department of Forests and Waters and by the Delaware County Planning Commission and the Delaware County Board of School Directors.

17. The School Board's application for approval of School Board Project, Form P. I. B. B. 40B, including the detailed costs and financing plan by bond issue as described in the testimony has been approved by the Pennsylvania Department of Public Instruction.

18. The articles of the non-profit corporation, The Connolly Foundation, which owns the property in question, provide specifically that "Its purposes are as follows:

> "The Corporation shall be operated exclusively for religious, charitable, scientific, literary or educational purposes.
>
> "(A) The activities which the Corporation shall carry on from time to time shall be such as may be determined by the Board of Directors to promote the public welfare, whether such activities be purely religious, charitable, scientific, literary or educational, or whether they be a combination of such purposes."

19. Religious uses are allowed under the applicable provisions of the Haverford Township Zoning Ordinance as a special exception. An application for such a special exception was filed and hearing fixed for December 4, 1962, when the application was withdrawn.

20. At the time of the condemnation, November 9, 1967, the Connolly property had been unoccupied since August, 1967, when the Holy Rosary Sisters who had been occupying it on a temporary emergency basis because of a fire in their former home in Radnor Township moved out to another location where they had built their own home.

21. The present school tax millage in the School District is 74 mills.

22. The present (1968) real estate assessment for tax purposes in the School District is $62,941,725.00.

23. With the 30-year bond issue recommended by the School Board and its financial advisors, using the 1968 tax assessment figure, and an anticipated interest rate of 4½ per cent, the anticipated total annual cost of the project

would result in a tax millage increase of 11.26 mills. This figure would increase approximately ¼ of a mill for every ¼ per cent increase in the actual interest.

24. The total cost of the school project is anticipated to be $9,237,300.00. This total cost includes structure, architect, movable fixtures and equipment, site costs (including acquisition), counsel fees, authority expenses, bond interest and other costs.

25. The estimated amount of the total cost to be financed by bonds is $8,920,000.00.

26. The project would (as are most of the other major school projects) be financed through the existing Haverford Township School District Authority.

27. Without resorting to authority financing, the total remaining non-electoral borrowing capacity is $1,717,086.25 and the total remaining electoral borrowing capacity is $4,729,173.50.

28. The security for the condemnation is the taxing power of the School District which is sufficient to raise the funds necessary to guarantee payment to the condemnee since the whole project would increase the school tax millage only 11.36 mills.

29. The Little Sisters of the Assumption property, which is immediately adjoining the Connolly property, was purchased by the School District through a straw party for $180,000.00.

30. The Court takes judicial notice and the attorney for the condemnee agrees that the School Board's real estate appraiser, H. Leonard Paret, is eminently qualified.

31. Mr. Paret has made an appraisal of the property for the owner in 1962 and again made a cursory appraisal

in 1967 after contact by the School Board through the School Board's solicitor and the superintendent. In July of 1967, Mr. Paret advised the School Board that the value of the Connolly property would run in the neighborhood of $300,000.00.

32. After a further inspection of the property and study of the problem, Mr. Paret gave his opinion that the market value was $280,000.00 as of July 12, 1968.

33. There is no evidence that the School Board acted in a fraudulent or arbitrary manner.

34. The property condemned does not belong to a church or religious association or to an institution of learning.

35. The Connolly Foundation purchased the property in question with the same buildings thereon as presently existing in 1962 for $125,000.00.

DISCUSSION

The condemnee first contends that condemnor must attempt to reach an agreement on the terms of purchase of ground and attempt to negotiate a sale prior to condemning land. In the *Pittsburgh School District Condemnation Case,* 430 Pa. 566, it was held that an effort to negotiate a purchase before condemnation is not necessary. In any event the testimony of the Board's agent, Arthur Wagner, and that of R. Winfield Baile, Esquire, was that when inquiry was made of the owner of the property, he said it was not for sale to the School District. Before condemnation proceedings, there is no requirement that a specific offer be made when the owner indicates the property is not for sale. *Spann v. Joint Board of School Directors of Darlington Township,* 381 Pa. 338.

The condemnee also contends that the land in question is exempt from condemnation. This contention is based upon Section 721 of the Public School Code of 1949 (24 P. S., Section 7-721) which provides:

> "Whenever the board of school directors of any district cannot agree on the terms of its purchase with the owner or owners of any real estate that the board has selected for school purposes, such board of school directors, after having decided upon the amount and location thereof, may enter upon, take possession of, and occupy such land as it may have selected for school purposes, whether vacant or occupied, and designate and mark the boundary lines thereof, and thereafter may use the same for school purposes according to the provisions of this Act:
>
> "Provided: That no board of school directors shall take by condemnation any burial ground, or any land belonging to any incorporated institution of learning, incorporated hospital association, or unincorporated church, incorporated or unincorporated religious association, which land is actually used or held for the purpose for which such burial ground, institution of learning, hospital association, church or religious association was established."

The condemnee argues that it is an incorporated religious association within the meaning of the Act and secondly that the land in question was actually used or held for religious purposes. It argues further that 98 per cent of the charitable contributions have been to religious organizations and that from the time the property was purchased in 1962 until its condemnation in November of 1967, it was *used* solely for religious purposes.

We feel that the giving of monetary contributions to a religious association, as was done here, would classify the Foundation as being a charity, but would not make it a religious association itself. We feel that the Connolly Foundation cannot be classified as a religious association under the traditional meaning of that term as used in the Act. If the legislature intended to exempt land owned by charities, it could have very easily added that word to the section of the Act in question.

Since we find the Connolly Foundation is not a religious association, it is not necessary for us to determine whether or not the land in question was used or held for such religious purposes. The remaining preliminary objections raised by the condemnee are dismissed without discussion.

CONCLUSIONS OF LAW

1. Before condemnation proceedings, there is no requirement that a specific offer be made when the owner indicates the property is not for sale.

2. The regularity of condemnation proceedings will not be inquired into when a condemnation resolution is placed on the minutes of the meeting of the School Board unless there is affirmative showing that the minutes were fraudulent or had no basis in fact. *Jury v. Wiest*, 326 Pa. 554, 558 (1937); *Spann v. Joint Board of School Directors of Darlington Township, et al.*, 381 Pa. 338, 347 (1955). There is no showing in the instant case of any such fraud, and the minutes are based on the fact of and contain the condemnation resolution.

3. Condemnor's determination of amount and location of land needed is not subject to review unless fraudulent, arbitrary or capricious.

4. The power of school districts to condemn land required for school purposes is conferred by the Act of March 10, 1949, P. L. 30, Art. VII, 24 P. S. 7-721.

5. The effect of condemnation is to pledge the taxation of the school district for all damages which may be sustained by the owner on account of the taking of the property. The pledge of the condemnor's taxing power is constitutional and automatically provided by Statute (Act of 1949, March 10, P. L. 30, Art. VII, Sec. 722, 24 P.S. 7-722).

6. The property condemned does not belong to a church or religious association, or to an institution of learning and is not exempt under the Public School Code of March 10, 1949, P. L. 30, 24 P. S. 7-721.

7. Under the Eminent Domain Code of 1964, P. L. 84, Sec. 402, 26 P. S. 1-402, which is applicable to this case, an effort to negotiate a purchase before condemnation is not necessary.

8. The contents of the declaration of taking are specified by the Act of 1964, Special Sessions, June 22, P. L. 84, Art. IV, Sec. 402, 26 P. S. 1-402, in eight consecutively numbered requirements. The declaration of taking filed of record in this matter contains everything that is required by the Act of Assembly in eight consecutively numbered paragraphs corresponding to the eight consecutive requirements of the Act.

9. There is no requirement in the condemnation procedure that the declaration of taking mention the anticipated cost.

10. The statement in the declaration of taking that the purpose is to acquire lands for a new school building and playgrounds is sufficiently specific and clear.

11. The proper citation of the statutory condemning authority is given in the declaration of taking.

12. The condemnee has not shown fraud or abuse of discretion.

13. There is no requirement that the funds necessary to finance the project must be on hand in advance of the taking.

14. A school authority acts as an alter ego of a school district to undertake public school projects which the school district by reason of its debt limitation cannot undertake.

15. When school districts use authority financing, contracts or engagements which create obligations not exceeding current revenues do not constitute debt within the contemplation of the Constitution of Pennsylvania, Art. IX, Sec. 8 and 10.

16. With respect to the payment of compensation for the damages caused by the taking, the particular manner or source of payment is not condemnee's concern; it is a matter for determination by the school district.

17. The school district has unlimited ad valorem taxing power to pay lease rentals to a school authority to finance the construction of the proposed middle school. Section 672 of the Public School Code of 1949 (The Act of March 10, 1949), P. L. 30, as last amended by Act #567, approved January 26, 1966, 24 P. S. 6-672.

FINAL DECREE

And Now, to wit, this 23rd day of Jan., A. D. 1969, after the taking of testimony and the hearing of arguments on the above matter before the Court en banc, it is hereby Ordered and Decreed that the preliminary objections filed by the condemnee be and the same are hereby dismissed.

By The Court:

J.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

No. 1, January Term, 1970.

APPEAL FROM THE ORDER OF THE COURT OF COMMON PLEAS OF DELAWARE COUNTY AT No. 13741 OF 1967.

IN RE: DECLARATION OF TAKING OF CERTAIN *PREMISES LOCATED AT THE SOUTH SIDE OF* COLLEGE AVENUE AND WEST SIDE OF COOPERTOWN ROAD AND EXTENDING TO DARBY ROAD, BY THE SCHOOL DISTRICT OF HAVERFORD TOWNSHIP

THE CONNELLY FOUNDATION,

Appellant.

OPINION OF THE COURT

O'BRIEN, *J.* Filed: April 22, 1970.

On November 9, 1967, the Board of School Directors of the School District of Haverford Township passed a resolution authorizing the filing of a Declaration of Taking of premises owned by appellant. The appellant filed preliminary objections to the Declaration of Taking, arguing that its property is exempt from condemnation under Section 721 of the Public School Code, and for the further reason that the appellee had failed to give proper security for the payment of just compensation.

After hearing, the lower court entered its order dismissing the preliminary objections.

The Act of March 10, 1949, P. L. 30, Art. VII, Sec. 721, known as the Public School Code of 1949, 24 P. S. 7-721, provides:

> "Whenever the board of school directors of any district cannot agree on the terms of its purchase with the owner or owners of any real estate that the board has selected for school purposes, such board of school directors, after having decided upon the amount and location thereof, may enter upon, take possession of, and occupy such land as it may have selected for school purposes, whether vacant or occupied, and designate and mark the boundary lines thereof, and thereafter may use the same for school purposes according to the provisions of this Act: Provided, *That no board of school directors shall take by condemnation any burial ground, or any land belonging to any incorporated institution of learning, incorporated hospital association, or unincorporated church, incorporated or unincorporated religious association, which land is actually used or held for the purpose for which such burial ground, institution of learning, hospital association, church or religious association was established.*" (Emphasis supplied.)

Appellant contends that, when viewed in light of its totality of activity, it is a religious association, and the land here involved is used for the purpose for which appellant was established.

As evidence of its status as a religious organization, appellant emphasizes the following facts:

1. Its articles provide specifically that "Its purposes are as follows:

"The Corporation shall be operated exclusively for religious, charitable, scientific, literary or educational purposes.

"(A) The activities which the Corporation shall carry on from time to time shall be such as may be determined by the Board of Directors to promote the public welfare, whether such activities be purely re-religious, charitable, scientific, literary or educational or whether they be a combination of such purposes."

2. For the years 1965, 1966 and 1967, appellant made contributions totaling $1,206,804.69 to charitable organizations, ninety-eight percent of which were to religious organizations.

3. The property in question was used off and on by the Holy Rosary Sisters after they had a fire at their own convent at Villanova in 1963 until they moved out in August of 1967. In addition, appellant contributed $23,581.48 in 1966 and $24,522.01 in 1967 to the Holy Rosary Sisters for the operation of the premises.

During part of 1962, the property was used by the Sisters of the Grey Nuns. At that time the Grey Nuns submitted an application for an appeal from the action of the building inspector in refusing a permit for use and occupancy of the building for religious purposes. The application was withdrawn in December of 1962.

In *Corpus Juris Secundum,* religious society (or association) has the following definition:

"A religious association is made up of individuals who have associated together for religious as opposed to secular purposes." 76 C. J. S. Religious Societies, Sec. 1(a), p. 734.

Webster's Third New International Dictionary defines the word "religious" as "of or pertaining to religion; concerned with religion, teaching or setting forth religion."

Black's Law Dictionary, 4th Edition, at Page 1455, defines "religion" as "Man's relation to Divinity, to reverence, worship, obedience, and submission to mandates and precepts of supernatural or superior beings."

Appellant is composed of twenty to twenty-five members, all of whom became members automatically by making a contribution to the appellant. Although the members "theoretically" have the power to elect the board of directors, the membership does not actually meet, and appellant's president testified that the board was not actually elected. The board meets four to six times a year, three of its six directors being members of the Connelly family.

The Statutory Construction Act, the Act of May 28, 1937, P. L. 1019, Art. IV, Sec. 58 (46 P. S. 558) calls for the strict construction of statutory exemptions of land from condemnation. With this rule of statutory construction in mind, after examining these facts, we agree with the court below. The members of appellant have associated together for purposes of making charitable contributions to any one of the five purposes enumerated in its charter, all of which generally are "to promote the public welfare." As such, appellant is a charity, not a religious association.

The cases relied on by appellant can be easily distinguished. *In re Morgan's Estate,* 173 Ohio St. 89, 180 N. E. 2d 146 (1962), dealt with an organization which existed solely to administer pensions for employees of the Presbyterian Church. *In re Pratt's Estate,* 78 App. Div. 301, 79 N. Y. S. 971 (1903), dealt with a corporation organized to provide floating and other churches for seamen. Appellant, on the other hand, administers no such

program. It was organized to provide money for five types of organizations which promote the public welfare, only one type of which could be but was not necessarily an organization like the religious associations which were the subjects of *Morgan* and *Pratt, supra.* Therefore, appellant's property could not be exempt from condemnation.

Appellant also argues that its property was taken without due process of law, since appellee failed to give adequate security to secure payment of just compensation.

The effect of condemnation is to pledge the power of taxation of the school district for all damages which may be sustained by the owner on account of the taking of the property. The pledge of the condemnor's taxing power is constitutional and automatically provided by statute (Act of 1949, March 10, P. L. 30, Art. VII, Sec. 722, 24 P. S. 7-722). The school district has unlimited ad valorem taxing power to pay lease rentals to a school authority to finance its construction of the proposed school. Sec. 672 of the Public School Code of 1949 (The Act of March 10, 1949, P. L. 30), as last amended January 26, 1966, P. L. (1965) 1606, Sec. 1, 24 P. S. 6-672.

We agree with the court below. The pledge of the school district's taxing power is sufficient security to pay appellant just compensation and to fulfill the requirements of due process.

Order affirmed.

APPENDIX B.

Statutes Involved.

Sections 672, 721 and 722 of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, Art. VII, 24 Purd. Stat. §§ 6-672, 7-721 and 7-722 reads as follows:

§ 6-672 *Tax Levy; Limitations*

(a) In all school districts of the second, third, and fourth class, all school taxes shall be levied and assessed by the board of school directors therein, during the month of February or March or April or May or June each year, for the ensuing fiscal year, except in districts of the second class where the fiscal year begins on the first day of January, in which the school taxes shall be levied and assessed during the month of October or November of each year. In school districts of the second class the tax rate shall not exceed twenty mills on the dollar, and in school districts of the third and fourth class shall not exceed twenty-five mills on the dollar, on the total amount of the assessed valuation of all property taxable for school purposes therein. Each school district of the second, third or fourth class may also collect a per capita tax on each resident or inhabitant of such district, over twenty-one years of age, as herein provided.

(b) Boards of school directors of districts of the second, third, and fourth classes are hereby authorized and directed to levy annually, a tax on each dollar of the total assessment of all property assessed and certified for taxation therein, (1) to pay up to and including the full amount of the minimum salaries and increments of the teaching and supervisory staff provided for herein, (2) to pay rentals due any munici-

pality authority or nonprofit corporation or due the State Public School Building Authority, (3) to pay sinking fund charges incurred in connection with school building projects approved by the Department of Public Instruction, and (4) to pay for the amortization of a bond issue which provided a school building prior to the first Monday of July, 1959.

(c) The tax levied to pay the minimum salaries and increments of the teaching and supervisory staff shall not be invalidated or affected by reason of the fact that in determining the amount to be raised by such tax for the payment of minimum salaries and increments no deduction was made for appropriations or reimbursements paid or payable by the Commonwealth to the School District which are applicable directly or indirectly to the minimum salaries and increments. None of said taxes shall be invalidated or affected by reason of the fact that it may increase the total annual school tax levy of any school district beyond the millage fixed or limited by this section.

(d) The boards of school directors of all independent school districts in which the board members are elected or appointed by court may, annually, levy a tax as herein authorized, at the same time and in the same manner as other school districts of the same class to which such independent district belongs, in an amount which shall be sufficient with all other taxes imposed by such district to pay the expenses of such district as set forth in subsection (b) of this section and to pay all other expenses and requirements of such district: Provided, That such tax shall not be more than seventy-five (75) mills on the dollar on the total amount of the assessed valuation of all property

taxable for school purposes within such district. Each such district may also collect, annually, a per capita in an amount of not less than one dollar ($1) and not more than ten dollars ($10) on each resident or inhabitant of such district over twenty-one (21) years of age.

§ 7-721 *Condemnation of Land*

Whenever the board of school directors of any district cannot agree on the terms of its purchase with the owner or owners of any real estate that the board has selected for school purposes, such board of school directors, after having decided upon the amount and location thereof, may enter upon, take possession of, and occupy such land as it may have selected for school purposes, whether vacant or occupied, and designate and mark the boundary line thereof, and thereafter may use the same for school purposes according to the provisions of this act: [1] Provided, That no board of school directors shall take by condemnation any burial ground, or any land belonging to any incorporated institution of learning, incorporated hospital association, or unincorporated church, incorporated or unincorporated religious association, which land is actually used or held for the purpose for which such burial ground, institution of learning, hospital association, church, or religious association was established.

§ 7-722 *Security for Damages; Fee Simple Title*

The school funds which may be raised by taxation in any school district shall be pledged, and hereby are made security, to the owner or owners of any property taken for school purposes, for all damages

they may sustain on account of taking of such property by the district for school purposes.

The title to all real estate acquired by any school district by condemnation proceedings shall be vested in such school district in fee simple.

Section 403 of the Eminent Domain Code, Act of June 22, 1964, P. L. 84, Art. V, §§ 1-403(B) reads as follows:

§ 1-403 *Security Required*

(a) Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

(b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

(c) Insufficient Security. The court, upon preliminary objections of the condemnee under and within the time set forth in section 406(a),[1] may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970.

No. 405.

In Re: Declaration of Taking of Certain Premises Located at the South Side of College Avenue and West Side of Coopertown Road and Extending to Derby Road, by the School District of Haverford Township.

THE CONNELLY FOUNDATION,
Appellant,

v.

SCHOOL DISTRICT OF HAVERFORD TOWNSHIP,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL OR AFFIRM.

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MOTION TO DISMISS OR AFFIRM.

Appellee moves the Court to dismiss the Appeal herein or to affirm the Judgment of the Supreme Court of Pennsylvania on any or all of the following grounds:

1. The Appeal does not present a substantial Federal question.

2. The Appellant seeks to raise a question involving the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment *now* whereas it was not raised or passed on by the Courts below, is not substantial, and on the merits it is clear that the Constitutional rights of Appellant have not been violated.

3. The Judgment appealed from rests on an adequate non-Federal basis.

4. The Appeal was not taken in conformity to Statute and Rules.

OPINIONS BELOW.

The Opinion of the Supreme Court of Pennsylvania is reported at 437 Pa. 536 (1970) and affirms the Opinion and Order of the Court of Common Pleas of Delaware County, Pennsylvania, as reported at 56 Delaware Co. Rep. 264 (1969). Both Opinions are set forth in Appendix A at pages A1-A16 of Appellant's Jurisdictional Statement.

STATUTES INVOLVED.

The Statutes of the Commonwealth of Pennsylvania involved are:

The Public School Code, Act of March 10, 1949, P. L. 30, Art. VII, section 721, 722 and 672 (24 P. S. 7-721, 7-722, 6-672). The Eminent Domain Code, Act of June 22, 1964, P. L. 84, Art. V, section 403(B) (26 P. S. 1-403), as set forth in Appendix B of Appellant's Statement of Jurisdiction and also in Appendix herein, pp. 15-18.

The United States Statute 28 U. S. C. 1257 is also set forth in Appendix herein, pp. 18-19.

STATEMENT.

On November 9, 1967, the Board of School Directors of the School District of Haverford Township, Delaware County, Pennsylvania, at a regularly scheduled public meeting, passed and adopted a Resolution condemning the subject property owned by the Connelly Foundation. The Declaration of Taking was filed with the Delaware County Court on November 10, 1967. The Appellant Connelly Foundation, Owner of the premises is a non-profit Pennsylvania corporation formed in 1955. The Corporate Charter of Appellant provides:

> "The corporation does not contemplate pecuniary gain or profit, incidental or otherwise, to its members. Its purposes are as follows: The corporation shall be operated exclusively for religious, charitable, scientific, literary, or educational purposes.
>
> 'A. The activities which the corporation shall carry on from time to time shall be such as may be determined by the Board of Directors to promote the public welfare whether such activities be purely religious, charitable, scientific, literary, or educational, or whether they be a combination of such purposes'."

The property condemned, hereinafter sometimes referred to as the Connelly Property, consists of approximately seventeen (17) acres with buildings thereon erected. Together with adjoining properties known as The Little Sisters of the Assumption and the Lloyd Properties, the Connelly Property forms a tract of some forty-four (44) acres which the School District requires for a new Middle School providing for approximately twenty-one hundred (2100) students. The School District has acquired the Little Sisters of the Assumption property by purchase and the Lloyd property by condemnation followed by Agreement, Settlement and Deed.

In 1962, the Connelly Foundation purchased the Connelly property with the same buildings thereon now existing for One Hundred and Twenty-five Thousand ($125,000.00) Dollars. Since that time it has allowed two groups of Sisters of religious orders to occupy the property. However, on November 9, 1967, it had been unoccupied since August, 1967, when the Holy Rosary Sisters, who had been occupying it on a temporary emergency basis because of a fire in their former home in Radnor Township, moved out to another location where they had built their own home. Appellant is in error and misleading when he says in his Statement that the property was used during this time for religious purposes; it wasn't used at all (Delaware County Court's Findings of Fact Nos. 20, 35. Appellant's Statement of Jurisdiction, Appendix A). Incidentally religious uses are allowed under the applicable provisions of the Haverford Township Zoning Ordinance as a special exception. An application for such a special exception was filed and a hearing fixed for December 2, 1962, when the application was withdrawn (Delaware County Court's Findings of Facts Nos. 19, 20, Appellant's Statement of Jurisdiction, Appendix A).

The Appellant Connelly Foundation filed Preliminary Objecitons to the Declaration of Taking and after rather extensive testimony and argument, the Delaware County Court dismissed the Preliminary Objections. From the Decree of the Delaware County Court, the Connelly Foundation took an appeal to the Supreme Court of Pennsylvania and put before that Court the following two (2) questions in its Brief:

> A. Whether Appellant is a religious association so as to render property held by it for religious purposes exempt from condemnation under section 721 of the Public School Code of 1949.

B. Whether a pledge of tax revenues by this Appellee as security to pay just compensation is sufficient to satisfy the requirements of the Due Process Clause of the 14th Amendment of the United States Constitution.

On April 22, 1970, the Supreme Court of Pennsylvania handed down an Opinion affirming the Lower Court's Order and agreeing with the Lower Court that the Connelly Foundation, although a Charity, was not a "Religious Association", and that the pledge of the School District's taxing power was sufficient security to pay Appellant just compensation and to fulfill the requirements of due process. The Opinion of the Supreme Court and the findings, conclusions and Decree of the Delaware County Court are set forth in Appendix A of Appellant's Jurisdictional Statement. The findings and conclusions of the Delaware County Court give a detailed but concise summary of the background of the case.

It is to be remarked that in both the County and the Supreme Courts below the Appellant Connelly Foundation failed to present or to raise any question or contention that any provision of the Constitution of the United States or its Amendments was involved in the judicial determination of the question of whether the Appellant was a "Religious Association" under the terms of section 721 of the Public School Code (Appendix p. 17). It is true that Appellant attempted to raise a Constitutional issue of due process in regard to the security provided under section 403(b) of the Eminent Domain Code (Appendix p. 18) but no Constitutional question involving the meaning of "Religious Association" exemption was ever mentioned.

ARGUMENT.

I. On the Holding That the Appellant Is Not a "Religious Association" and Thus Its Property Not Exempt Under the Public School Code.

In both the County and the State Supreme Court below the Appellant failed to present or raise any question, contention, suggestion, pleading or argument that any provision of the Constitution of the United States or its Amendments was involved in the judicial determination of the question of whether or not the Appellant was exempt as "a Religious Association" under the terms of section 721 of the Public School Code (Appendix p. 17). The Appellant sought simply to establish that Appellant was "a Religious Association".

It may be as Appellant argues that religion no longer necessarily involves theism, i.e. belief in the existence of God or a God; but it does not follow from this premise that the Connelly Foundation is a "religious association" or indistinguishable from associations that are undeniably religious. The cases cited by Appellant, *Welsh v. U. S.*, 38 LW 4486, #76 October T, 1969, and *U. S. v. Seeger*, 380 U. S. 163, dispensing with the necessity of theism and perhaps traditional concepts of religion in determining whether or not one's beliefs and "scheme of things" function as a basis for deep conscientious scruples exempting one from military service do not help the Appellant really. Unlike the draft exemption Statute involved in the *Welsh* and *Seeger* cases, the Statutory Exemption involved in the instant case does not specify or require theism.

Furthermore the Court majority opinion in *Welsh* specifically stated it was not passing on any Constitutional question raised; the case came up through the Federal System involving a Federal Statute. In the instant case however, no Federal Court or Federal Statute is involved, and

Appellant must present a substantial Constitutional question before the Court will review his case.

The Appellant the Connelly Foundation argues that it is "a Religious Association" and its property exempt from condemnation under section 721 of the Public School Code because 98% of its charitable contributions have been to religious organizations and because it has, since 1962, when it acquired the property, allowed two groups of Sisters of religious orders to occupy the property until it became vacant about two months before it was condemned by the Appellee: This argument fails to give proper consideration to the Charter or Articles of Incorporation of the Connelly Foundation, the Character of its Board of Directors, and what the words "Religious Association" mean. Black's Law Dictionary gives the following definition of Religious Society or Association:

> "A body of persons associated together for the purpose of maintaining religious worship. The communicants of a denomination who statedly attend services in the church edifice. *Fiske v. Beaty*, 201 N. Y. S. 441, 444; 206 App. Div. 349. A church and society are often united in maintaining worship, and in such cases, the society commonly owns the property, and makes the pecuniary contract with the minister. But in many instances, societies exist without a church and churches without a society. *Silsby v. Barlow*, 16 Gray (Mass.) 330; *Weld v. May*, 9 Cush. (Mass.) 188; *Hebrew Freed School Assn. v. New York*, 4 Hun. (N. Y.) 449."

In Corpus Juris Secundum, religious society (or Association) has the following definition:

> "A religious association is made up of individuals who have associated together for religious as opposed

to secular purposes." 76 C. J. S. Religious Societies, Sec. 1(a), p. 734.

Of course, it is not necessary that the Condemnee be a Church to be exempt. On the other hand, the Connelly Foundation Corporate Charter provides:

> "The Corporation does not contemplate pecuniary gain or profit, incidental or otherwise, to its members. Its purposes are as follows: The Corporation shall be operated exclusively for religious, charitable, scientific, literary or educational purposes.
>
> A. The activities which the Corporation shall carry on from time to time shall be such as may be determined by the Board of Directors to promote the public welfare whether such activities be purely religious, charitable, scientific, literary, or educational, or whether they be a combination of such purposes."

It is obvious that "religious purposes" is only one of the five distinct purposes specified in its Articles and the only one that would give it exemption under the Public School Code. Furthermore, its Board of Directors under the Charter may as they may be inclined from time to time in their discretion, pick, choose and change the Foundation's activities as long as they adhere to any one or more of the five stated purposes.

The Connelly Foundation does not profess to meet for religious worship or instruction. The Board of Directors is composed mainly of members of the Connelly family and in nowise does it allege, pretend, profess or consent to be dominated, controlled or subservient or subordinate to any religious society, sect, denomination, congregation, Church, or any substitute therefor. There is no evidence or record of it espousing or holding any belief playing the role of religion nor of enunciating such a belief. A commendable

charitable organization the Connelly Foundation is; a religious association, it is not.

Apart from the Argument on the merits as outlined above, the Appellant is faced with a fatal omission. At no time or place in the courts below did the Appellant raise any right or prohibition under the Establishment Clause to the First Amendment to the United States Constitution or the Equal Protection Clause of the Fourteenth Amendment nor were the Courts asked, nor did the Courts consider any such Constitutional aspects. The first time Appellant raises these Constitutional rights or prohibitions is in the Jurisdictional Statement that is filed in this Court. This is too late to raise any Federal question for the first time. It is the record below which must affirmatively show a raising of the Federal issue. See *White River Lumber Co. v. Arkansas ex rel. Appelgate,* 279 U. S. 692, 700; *Whitney v. California,* 274 U. S. 357, 362-3; *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U. S. 341, 344; *Thomas v. Iowa,* 209 U. S. 258. Review in the United States Supreme Court is limited to specific Federal questions that were properly raised in the State Courts. *Whitney v. California,* 274 U. S. 357, 362-3; *Dewey v. Des Moines,* 173 U. S. 193, 197-8; *Wilson v. Cook,* 327 U. S. 474, 483-4; *Adler v. Board of Education,* 342 U. S. 485, 496; *State Farm Mutual Ins. Co. v. Duel,* 324 U. S. 154, 160-1.

The Appellant is likewise precluded from urging a Federal issue that was neither raised not decided below even though such issue might have been raised. *Safeway Stores v. Oklahoma Grocers,* 360 U. S. 334, 342 n. 7; *Cardinale v. Louisiana,* 394 U. S. 437, 438. The Rule that in cases coming from State Courts the Supreme Court may review only those issues which were presented to the State Court is not discretionary but jurisdictional. *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U. S.

308, 334. Appellant didn't raise any Constitutional question in the State Courts involving the exemption, nor did the State Courts rule on any such alleged Constitutional question.

It appears that there is a further defect in Appellant's Appeal. Appellee submits that an Appeal is not the proper procedure in this case in the first place. The four cases cited by Appellant under the heading "Jurisdiction" on which he relies to "sustain the Jurisdiction of this Court to review the Judgment on Appeal" pre-date the Judiciary Act of 1925 and came to the Court on the old Writ of Error. All of these cases had *attacked the validity* of the State Statute involved and the Lower Court had sustained the validity. In the Lower Courts in the instant case, however, the Appellant never questioned the validity of the Public School Code or of "the religious association" exemption specified therein. Nor were the Lower Courts asked to rule on its validity. The Appellant even now does not attack the validity of the Statute. Thus, no appeal jurisdiction under 28 U. S. C. 1257 exists in this case. Appellee's other reeasons for dismissal set forth in this Motion apply with at least the same force and effect if the Appeal is regarded as a Petition for Certiorari.

II. On the Pledge of Appellee's Taxing Power as Sufficient Security for the Payment of Just Compensation for the Condemnation of Appellant's Property.

The power of the Appellee to condemn land is conferred by Pennsylvania Statute, the Public School Code, the Act of March 10, 1949, P. L. 30, Article VII, Section 721 et seq. (24 P. S. 7-721 et seq.). The Statute is set forth in Appendix hereof. Section 721 (24 P. S. 7-721) provides that the effect of condemnation is to pledge the tax revenue to the School District for all damages which might be sustained by the Owner on account of the taking of the property. In-

cidentally, the legality of this Statute has been upheld by the decisions of the Lower Courts, not only in the instant Case, but in *Spahn v. Joint Board of School Directors*, 381 Pa. 338, and in *Jerry v. Weist*, 326 Pa. 554.

There is no doubt that due process requires adequate security for the payment of just compensation. However, the case first cited by Appellant, *Cherokee Nation v. Southern Kansas Railway Company*, 135 U. S. 641 (1890), is not in any way apposit to the instant Case. *Cherokee* involved condemnation of Cherokee land by the Railroad acting under a Federal Statute. Of course, the Railroad didn't have any taxing power so there was none to pledge as security. The Supreme Court of the United States held inter alia that the security required by the Statute—twice the value of the land—was sufficient. The taxing power of the School District in this instant Case far exceeds twice the value of the Connelly property.

As a practical matter, the Appellant Connelly Foundation has no grounds for fear the School District cannot and will not pay him. It is a matter of record, undisputed, and the County Court found that Connelly paid only One Hundred and Twenty-five Thousand ($125,000.00) Dollars for the property in 1962 with the same buildings thereon as now exists (Delaware County Courts Finding of Fact No. 35, Appendix A of Appellant's Jurisdictional Statement). The evidence of market value in July, 1968, given by an appraiser whom Court and Counsel of both parties agree is eminently qualified, was Two Hundred and Eighty Thousand ($280,000.00) Dollars (Delaware County Courts Finding of Facts Nos. 32, 30, Appellant's Jurisdictional Statement Appendix A). There was no other evidence offered in this case relating to the value of the Connelly property. Of course, the final value will be determined by a jury of view in further procedures and the Appellant will have a right of Appeal if dissatisfied with the result.

The School District has *unlimited ad valorem taxing power* to pay lease rentals to a school authority to finance construction of the proposed school and to pay sinking fund charges incurred in connection with school building projects approved by the Department of Public Instruction. (Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, Article VII (24 P. S. 6-672), Appendix pp. 15-16 and the opinion of the Supreme Court of Pennsylvania below.) As has been remarked, the evidence of value of the subject property is Two Hundred and Eighty Thousand ($280,000.00) Dollars. The remaining non-electoral and electoral borrowing capacities of the School District are $1,717,086.25 and $4,729,173.50, respectively. (Delaware County Court's Findings of Fact 27, Appellant's Statement of Jurisdiction Appendix A). Thus the School District can choose even without resort to Authority Financing (which is discussed below) to issue its own non-electoral bonds to borrow the money to provide just compensation to the Connelly Foundation, and use its unlimited ad valorem taxing power to pay the sinking fund charges since the school project has been approved by both the various Pennsylvania State Departments involved and the Delaware County Board of School Directors (County Court's Findings of Fact Nos. 16, 17, Appendix A of Appellant's Jurisdictional Statement).

On the other hand the total cost of the whole project is anticipated to be $9,237,300.00 of which $8,920,000.00 will be financed by Bonds. This total cost includes structure, Architect, movable fixtures and equipment, site costs, including acquisition, Counsel fees, Authority expenses and other costs. (Delaware County Court's Finding of Facts Nos. 24, 25, Appellant's Jurisdictional Statement Appendix A.) With the thirty (30) year bond issue recommended by the School Board and its financial advisors, the 1968 tax figures, and an anticipated interest rate of four and one-half (4½%) per cent, the anticipated total annual cost of the project will

result in a tax millage increase of only 11.26 mills over the present millage of seventy-four (74) mills in the School District. This figure would increase approximately one-quarter (¼) of a mill for every one-quarter (¼%) per cent increase in the actual interest. It is to be noted that the 1968 Real Estate Assessment for tax purposes in this School District is $62,941,725.00 (Delaware County Court's Finding of Facts Nos. 21-24, Appellant's Jurisdictional Statement Appendix A). It is thus seen that the value of the Connelly property $280,000.00 is only a shade over three per cent (3%) of the total cost of the project of $9,237,300.00, and yet the whole project will result in only an anticipated tax millage increase of something less than twelve (12) mills. Of course, the School Board sets the tax millage.

The project including the purchase of the land involved and the building of the School, would be financed as are most of the other major School projects through the existing Haverford Township School District Authority which is not limited by the remaining non-electoral and electoral barring capacities of the School District of $1,717,086.25 and $4,729,173.50 respectively (Delaware County Court's Findings of Facts Nos. 26, 27). When a School District uses Authority Financing, contracts or engagements which create obligations not exceeding current revenues do not constitute debt within the contemplation of the Constitution of Pennsylvania limiting School District debt. *Conrad v. Pittsburgh*, 421 Pa. 492; *Greenhall v. Woolworth*, 361 Pa. 543; *Detweiler v. School District of Hatfield*, 376 Pa. 555. In such circumstances the Authority acts as an alter ego of the School District to undertake Public School projects which the School District by reason of its debt limitations could not otherwise undertake. *Southwest Delaware County Municipal Authority v. Aston Township*, 413 Pa. 526. Furthermore, the School District has unlimited ad valorem taxing power to pay lease rentals to a School Authority to

finance the construction of the proposed Middle School, as provided in the Public School code Section 672 (Appendix hereof) as the Supreme Court of Pennsylvania has stated on the last page of its Opinion which is set forth in Appendix A of Appellant's Jurisdictional Statement.

The School Board's application for approval of the School project, including the detailed costs, financing plan and selection of site, has been approved by both the various Pennsylvania State Departments involved and the Delaware County Board of School Directors (County Court's Findings of Fact Nos. 16, 17, Appendix A of Appellant's Jurisdictional Statement).

The Pledge of the tax revenues by the School District is certainly sufficient security to pay condemnee Appellant just compensation to satisfy the Due Process Clause.

CONCLUSION.

For the foregoing reasons in support of this Motion, the Appellee respectfully submits that the Judgment and decree of the Supreme Court of Pennsylvania should be affirmed and the appeal dismissed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Sections 672, 721 and 722 of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, Art. VII, 24 Purd. Stat. §§ 6-672, 7-721 and 7-722 reads as follows:

§ 6-672 *Tax Levy; Limitations*

(a) In all school districts of the second, third, and fourth class, all school taxes shall be levied and assessed by the board of school directors therein, during the month of February or March or April or May or June each year, for the ensuing fiscal year, except in districts of the second class where the fiscal year begins on the first day of January, in which the school taxes shall be levied and assessed during the month of October or November of each year. In school districts of the second class the tax rate shall not exceed twenty mills on the dollar, and in school districts of the third and fourth class shall not exceed twenty-five mills on the dollar, on the total amount of the assessed valuation of all property taxable for school purposes therein. Each school district of the second, third or fourth class may also collect a per capita tax on each resident or inhabitant of such district, over twenty-one years of age, as herein provided.

(b) Boards of school directors of districts of the second, third, and fourth classes are hereby authorized and directed to levy annually, a tax on each dollar of the total assessment of all property assessed and certified for taxation therein, (1) to pay up to and including the full amount of the minimum salaries and increments of the teaching and supervisory staff pro-

vided for herein, (2) to pay rentals due any municipality authority or nonprofit corporation or due the State Public School Building Authority, (3) to pay sinking fund charges incurred in connection with school building projects approved by the Department of Public Instruction, and (4) to pay for the amortization of a bond issue which provided a school building prior to the first Monday of July, 1959.

(c) The tax levied to pay the minimum salaries and increments of the teaching and supervisory staff shall not be invalidated or affected by reason of the fact that in determining the amount to be raised by such tax for the payment of minimum salaries and increments no deduction was made for appropriations or reimbursements paid or payable by the Commonwealth to the School Distrtict which are applicable directly or indirectly to the minimum salaries and increments. None of said taxes shall be invalidated or affected by reason of the fact that it may increase the total annual school tax levy of any school district beyond the millage fixed or limited by this section.

(d) The boards of school directors of all independent school districts in which the board members are elected or appointed by court, may, annually, levy a tax as herein authorized, at the same time and in the same manner as other school districts of the same class to which such independent district belongs, in an amount which shall be sufficient with all other taxes imposed by such district to pay the expenses of such district as set forth in subsection (b) of this section and to pay all other expenses and requirements of such district: Provided, That such tax shall not be more than seventy-five (75) mills on the dollar on the total amount of the assessed valuation of all property

taxable for school purposes within such district. Each such district may also collect, annually, a per capita in an amount of not less than one dollar ($1) and not more than ten dollars ($10) on each resident or inhabitant of such district over twenty-one (21) years of age.

§ 7-721 *Condemnation of Land*

Whenever the board of school directors of any district cannot agree on the terms of its purchase with the owners or owners of any real estate that the board has selected for school purposes, such board of school directors, after having decided upon the amount and location thereof, may enter upon, take possession of, and occupy such land as it may have selected for school purposes, whether vacant or occupied, and designate and mark the boundary line thereof, and thereafter may use the same for school purposes according to the provisions of this act: Provided, That no board of school directors shall take by condemnation any burial ground, or any land belonging to any incorporated institution of learning, incorporated hospital association, or unincorporated church, incorporated or unincorporated religious association, which land is actually used or held for the purpose for which such burial ground, institution of learning, hospital association, church, or religious association was established.

§ 7-722 *Security for Damages; Fee Simple Title*

The school funds which may be raised by taxation in any school district shall be pledged, and hereby are made security, to the owner or owners of any property taken for school purposes, for all damages they may sustain on account of taking of such property by the district for school purposes.

The title to all real estate acquired by any school district by condemnation proceedings shall be vested in such school district in fee simple.

Section 403 of the Eminent Domain Code, Act of June 22, 1964, P. L. 84, Art. V §§ 1-403(B) (26 P. S. § 1-403) reads as follows:

§ 1-403 *Security Required*

(a) Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

(b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

(c) Insufficient Security. The court, upon preliminary objections of the condemnee under and within the time set forth in section 406(a),[1] may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

28 U. S. C., Section 1257 reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."